

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

James Wages, and  
Carol Wages,  
Claimants,

v.

No. 94-00499

Smith Barney Harris Upham & Co., n/k/a  
Smith Barney, Inc.  
Dennis Melton, and  
Thomas Jeffrey,  
Respondents.

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REPRESENTATION OF PARTIES

Claimants James Wages and Carol Wages ("Claimants") were represented by Martin R. Galbut, Esq., of Galbut & Associates, Phoenix, Arizona.

Until March 21, 1995, Respondents Smith Barney Harris Upham & Co. ("Smith Barney") and Dennis Melton were represented by George Richardson, Esq., of Smith Barney, Inc., New York, New York. On March 17, 1995, notice was filed with the NASD that Smith Barney was being represented by Thomas Galbraith, Esq., of Lewis & Roca, Phoenix, Arizona. On March 20, 1995, notice was filed with the NASD that Dennis Melton ("Melton") was being represented by Paul Roshka, Esq., of O'Connor Cavanagh, Phoenix, Arizona.

Respondent Thomas Jeffrey ("Jeffrey") was represented by Rosemary Shockman, Esq., of Shockman & McKeegan, Phoenix, Arizona.

CASE INFORMATION

Claimants' Statement of Claim was filed on or about February 8, 1994. Claimants' Submission Agreement was signed on February 7, 1994. Claimants' Notice of Dismissal of Thomas Jeffrey was filed on or about March 3, 1995.

Court Order granting Smith Barney's Motion to Compel Arbitration dated November 1, 1993.

Jeffrey's Answer to the Statement of Claim was filed on or about April 27, 1994. Jeffrey's Submission Agreement was signed on April 27, 1994.

Letters requesting, from the Claimants, additional time to file an Answer for Respondents Smith Barney and Melton dated May 3, 1994, May 13, 1994, and May 17, 1994. The May 17, 1994, extension request also contained a request on behalf of Smith Barney and Melton that the letter serve as their general denial. Letter from Claimants dated June 29, 1994, objecting to any answer or response filed by Smith Barney and Melton pursuant to Section 25(b) of the NASD Code of Arbitration Procedure (the "Code"). Letter dated November 9, 1994, designated as the amended answer of Smith Barney and Melton.

#### HEARING INFORMATION

Pre-Hearing conference date: March 24, 1995. One (1) session.

Hearing dates:                      March 27, 1995. Two (2) sessions.  
   March 28, 1995. Two (2) sessions.  
   March 29, 1995. One (1) session.

Hearing Location:    Scottsdale, Arizona.

#### CASE SUMMARY

Claimants alleged that: Melton and Jeffrey made material misrepresentations and omissions of material fact in their investment recommendations to the Claimants on which the Claimants relied to make their decisions; Smith Barney, Melton and Jeffrey made unsuitable investment recommendations to the Claimants upon which the Claimants relied in accepting the purchase of the recommended securities in July of 1986; the misrepresentations and omissions made to the Claimants in connection with the investments in their account, as well as the conduct of Respondents related to the handling of their account, violated A.R.S. Section 44-1991 of the Arizona Securities Act; and A.R.S. Sections 13-2301 (D) (4) (r) and 13-2301 (D) (4) (t) under the Arizona Racketeering Act; and that the conduct of Smith Barney, Melton and Jeffrey caused severe physical, mental and emotional distress to both James and Carol Wages, and was done with a reckless disregard of the near certainty that such distress would result from the misconduct. The allegations arose out of the purchase of securities in 1986 and 1987 for Claimants' account at Smith Barney. The securities include: Westin Hotel Limited Partnership units; American Mutual Fund, Inc. shares; stock options more fully presented at the hearing in this matter; Sun State Savings & Loan stock; a Van Eck International Gold Fund stock; Eaton Vance stock; MFS Multimarket Income Trust stock, and other investments more fully presented at the hearing.

Jeffrey denied the allegations contained in the Statement of Claim. Jeffrey also asserted that he was not Claimants' account executive when they made the purchases in the Westin Hotel Limited Partnership and American Mutual Fund, Inc. purchases. Jeffrey also asserted that there had been no option trading in Claimants' account while he was their broker. Jeffrey further asserted that the Claimants alleged no specific wrongful conduct and that his conduct was lawful. Jeffrey stated that he became the Claimants' account executive only after Melton had left Smith Barney. In addition, Jeffrey also asserted the following: Claimants do not allege any allegations of conduct constituting racketeering; Claimants do not allege claims for recommending unsuitable investments, negligence, breach of fiduciary duty or violation of any securities laws or rules; Claimants' claims relating to the Eaton Vance Total Return Trust, Van Eck International Investors and MPS Multimarket Trust must be dismissed under Section 15 of the NASD Code of Arbitration Procedure (the "Code"); and that Claimants failed to mitigate their damages.

**RELIEF REQUESTED**

In their Statement of Claim, Claimants requested judgement against the Respondents, and each of them jointly and severally, as follows:

A. For actual damages in an amount to be proved at the hearing, including the disgorgement of commissions generated by the Respondents' handling of the account;

B. For punitive damages;

C. For treble damages pursuant to A.R.S. Section 13-2314.04(A);

D. For damages for illness, pain and suffering and emotional distress to be determined at the hearing;

E. For pre-award and post-award interest at the legal rate of 10% per annum;

F. For treble interest;

G. For their costs and attorneys' fees incurred in connection with maintaining their claims; and

H. For such other and further relief as the arbitrators deemed just and proper.

Jeffrey requested that the claim be dismissed and that he be awarded his attorney's fees and costs.

OTHER ISSUES CONSIDERED & DECIDED

On or about March 8, 1995, Claimants' filed with the NASD a Notice of Dismissal (the "Notice") of Thomas Jeffrey. Thomas Jeffrey was removed as a party to this arbitration pursuant to the Notice, and did not participate in the hearing of this matter.

On or about December 9, 1994, Claimants filed a Motion to Bar Respondents Smith Barney and Melton. The Motion was filed pursuant to Section 25(b)(2)(iii) of the Code. Smith Barney and Melton filed their response on or about December 20, 1994. After review of the relevant documents and deliberation, the undersigned arbitrators granted Claimants motion. Smith Barney and Melton were barred from presenting any matter, arguments or defenses at the hearing in this proceeding. On March 27, 1995, the panel interpreted its Order to allow Smith Barney to make argument and to cross examine witnesses as to Claimants' burden of proof.

On or about December 27, 1994, Smith Barney and Melton filed a Motion to Dismiss the Claimants' Statement of Claim as ineligible for arbitration. Claimants filed their response to the motion on or about January 10, 1995. After review of the relevant documents and deliberation, the undersigned arbitrators denied the Motion to Dismiss.

In or about January of 1995, Respondents Smith Barney and Melton filed a Request for Reconsideration of the panel's decision to grant Claimants' Motion to Bar. Claimants filed their Response to the request on or about February 3, 1995. After review of the relevant documents and deliberation, the undersigned arbitrators denied Smith Barney's and Melton's Request for Reconsideration.

On or about March 22, 1995, Smith Barney filed a Motion to Remove Arbitrator Brian Warnock for Cause and to Replace the Remaining Arbitrators. Claimants' filed their Response to the motion on March 23, 1995. On or about March 23, 1995, Smith Barney requested that its Motion be presented to the members of the panel as a request for recusal. The motion and attached exhibits, as well as Claimants' response were forwarded to the arbitrators by federal express. Due to the fact that the request was filed on the second business day before the hearing, the request, the response, and oral argument were considered by the arbitrators as the first preliminary matter to be heard on March 27, 1995. After consideration of Canon II E. (2) of the Code of Ethics for

Arbitrators In Commercial Disputes, the relevant documents, the positions of the respective parties, and deliberation, the undersigned arbitrators denied Smith Barney's request to recuse.

On March 27, 1995, at Smith Barney's request, a court reporter appeared at the hearing. After suggesting that the court reporter's record be the official record of this arbitration, the panel solicited comments from the parties. Based on the parties' comments, the panel made the court reporter's record the official record for this arbitration. The parties were also reminded that the NASD should be provided with a copy of any transcript made of this hearing.

On or about March 22, 1995, Melton filed a Motion to Dismiss the Statement of Claim. The motion and Claimants' response were taken up as a preliminary matter on March 27, 1995. After hearing arguments from the parties, review of the relevant documents and deliberation, the undersigned arbitrators granted Melton's Motion to Dismiss.

On or about March 23, 1995, Smith Barney filed a Motion for Determination that New York Law is Controlling. Claimants' filed their Response to the motion on March 27, 1995. After hearing from the parties, review of the relevant documents and deliberation, the undersigned arbitrators denied the motion, and determined that Arizona law would apply to this arbitration.

On or about March 23, 1995, Smith Barney filed a Motion for Dismissal of Proceedings Concerning Westin Hotel Limited Partnership Investment. On or about March 27, 1995, Claimants' filed their Response to the motion. After hearing from the respective parties, review of the documents and deliberation, the undersigned arbitrators denied Smith Barney's Motion for Dismissal.

On March 27, 1995, Smith Barney filed a Motion to Exclude Evidence of Emotional Damages, and made a Motion to Dismiss Claimants' claim for RICO damages. Smith Barney later withdrew their Motion to Exclude Evidence of Emotional Damages.

On March 27, 1995, during the formal opening of the hearing, the parties confirmed their acceptance of the undersigned arbitrators, with the exception of the matter raised in Smith Barney's request for recusal.

Smith Barney did not file a submission to arbitration. However, Smith Barney is required to submit to arbitration pursuant to

Section 12 of the Code, as well as the November 1993 Court Order compelling arbitration. Therefore, Smith Barney is bound by the determination of the panel on all issues submitted.

The parties have agreed that the Award in this matter may be executed by counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the original(s) remain on file with the NASD.

#### AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Smith Barney is liable for, and shall pay to Claimants James Wages and Carol Wages the sum of \$950,000.00 as satisfaction of their claims for compensatory damages and interest. The amount awarded includes an offset for the Westin Hotel Limited Partnership. The Claimants shall retain the partnership units.
2. Claimants James Wages' and Carol Wages' claims for punitive damages, RICO damages, and attorneys' fees are denied and dismissed with prejudice.

#### OTHER COSTS

Each party shall bear its own respective costs and fees associated with this arbitration, including attorneys' fees, except as set forth more fully below.

Respondent Smith Barney, Inc. is liable for, and shall pay to Claimants James Wages and Carol Wages their claim filing fees in the amount of \$1,250.00; all expert witness costs except those costs related to Dr. Wilt and the last day (March 29, 1995) of the hearing for Mr. Bateman; and all other recoverable costs associated with this arbitration including, but not limited to, reasonable costs of reproduction of documents, reasonable witness travel and expense fees, and reasonable long distance telephone and facsimile charges.

**FORUM FEES**

Pursuant to Section 43(c) of the Code, the following forum fees are assessed:

1 pre-hearing conference sessions @ \$300.00 per session

5 hearing sessions @ \$1,000.00 per session

Total hearing session fees to be assessed: \$5,300.00

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of \$250.00, and shall retain the hearing session deposit in the amount of \$1,000.00 previously paid to the NASD by the Claimants.

Additional forum fees in the amount of \$4,300.00 are assessed against Respondent Smith Barney, Inc.

Fees are payable to the National Association of Securities Dealers, Inc.

**CONCURRING ARBITRATORS**

Dated:

Name:

April 12, 1995

Brian R. Warnock /s/  
Brian R. Warnock  
Presiding Chair  
Public Arbitrator

April 12, 1995

Joseph F. Gross /s/  
Joseph F. Gross  
Public Arbitrator

April 12, 1995

William E. Saufley /s/  
William E. Saufley  
Industry Arbitrator

4-20-95